

**6050 POSSESSION OF DRUG PARAPHERNALIA — § 961.573(1)****Statutory Definition of the Crime**

The Wisconsin Statutes make it a crime to possess drug paraphernalia with the primary intent to use the drug paraphernalia to ingest, inhale, or otherwise introduce into the human body<sup>1</sup> a controlled substance, in violation of Chapter 961 of the Wisconsin Statutes.<sup>2</sup>

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant possessed an item.

“Possessed” means that the defendant knowingly<sup>3</sup> had actual physical control of an item.<sup>4</sup>

**ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:**

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, the item is in that person's possession, even though another person

may also have similar control.]

2. The item in question was drug paraphernalia.

“Drug paraphernalia” means all equipment, products, and materials of any kind that are used, designed for use, or primarily intended for use to ingest, inhale, or otherwise introduce into the human body a controlled substance.<sup>5</sup>

(Name controlled substance) is a controlled substance.<sup>6</sup>

3. The defendant possessed drug paraphernalia with the primary intent<sup>7</sup> to use it to ingest, inhale, or otherwise introduce into the human body a controlled substance.

### **Deciding About Intent and Knowledge**

You cannot look into a person’s mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 6050 was originally published in 1993 and revised in 1994, 1996, 2000, and 2006. This revision was approved by the Committee in April 2021; it added to the Comment.

This instruction is for the simple possession offense defined in § 961.573(1). It carries a penalty of a fine of not more than \$500 or imprisonment for not more than 30 days or both. Section 961.573 was

amended by 1999 Wisconsin Act 129 [effective date: May 24, 2000]. New sub. (3) was created; it prohibits possession of drug paraphernalia with “the primary intent” to use it in connection with methamphetamine. Violations of sub. (3) carry a maximum penalty of a fine of not more than \$10,000 or imprisonment for not more than 5 years or both. See Wis JI-Criminal 6053.

Other drug paraphernalia offenses are defined in § 961.574, manufacture or delivery of drug paraphernalia; § 961.575, delivery of drug paraphernalia to a minor; and § 961.576, advertisement of drug paraphernalia.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses, including the offense addressed by this instruction, to include “controlled substance analogs.” See Wis JI-Criminal 6005 for suggested changes for analog cases.

2013 Wisconsin Act 194 [effective date: April 9, 2014] created § 961.443. Under § 961.443, a defendant is entitled to immunity from criminal prosecution for possession of paraphernalia if the charge stems from the act of rendering aid to a person believed to be suffering from a drug overdose. Specifically, § 961.443(2) provides:

An aider is immune from prosecution under s. 961.573 for the possession of drug paraphernalia . . . under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

The phrase “circumstances surrounding” means that the facts forming the basis for the possession of paraphernalia charge must be closely connected to the events concerning the defendant rendering aid to an individual suffering from a drug overdose. State v. Lecker, 2020 WI App 65, 394 Wis.2d 285, 294, 950 N.W.2d 910.

An “aider” means a person who does any of the following:

- (a) Brings another person to an emergency room, hospital, fire station, or other health care facility and makes contact with an individual who staffs the emergency room, hospital, fire station, or other health care facility if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.
- (b) Summons and makes contact with a law enforcement officer, ambulance, emergency medical services practitioner, as defined in s. 356.01(5), or other health care provider, in order to assist another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.
- (c) Calls the telephone number “911” or, in an area in which the telephone number “911” is not available, the number for an emergency medical service provider, and makes contact with an individual answering the number with the intent to obtain assistance for another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog. Wis. Stat. § 961.443(1).

The legislature did not expressly provide in § 961.443 who should make the immunity decision and when that decision should be made. However, in State v. Williams, 2016 WI App 82, 372 Wis.2d 365, 888 N.W.2d 1, the court held that the determination of immunity is to be made by the circuit court pretrial, not by the fact finder at trial. The burden is on the defendant to prove by a preponderance of the evidence that he or she is entitled to immunity. Id. at ¶14.

1. The phrase beginning with “to ingest” is selected from the following complete statement in § 961.573(1):

... to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, inject, ingest, inhale, or otherwise introduce into the human body.

The Committee drafted the instruction for what is believed to be the most common case. If other alternatives are presented by the evidence, the instruction must be modified accordingly.

2. The reference to “in violation of Chapter 961” is included in the statutory definition of the crime, so it is included here. It is not included in the instruction's statement of the elements of the crime because the Committee concluded that “in violation of Chapter 961” could be addressed in the same way that statutory exceptions are generally treated. (See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon.) If the facts raise an issue about being “in violation of Chapter 961” a statement should be added to the second and third elements that indicates the burden is on the State to prove that there was intent to ingest, inhale, etc., “in violation of Chapter 961.”

3. Inherent in the legal definition of “possession” is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508 09, 451 N.W.2d 752 (1990).

“[T]he mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs were within the person's control. . . . [However] the presence of drugs is circumstantial evidence of prior possession.” State v. Griffin, 220 Wis.2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). To support a finding of possession, there must be sufficient corroborating evidence. Id.

4. The definition of “possess” is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to “possession” in criminal cases, including so called constructive possession.

5. This definition is based on the extremely lengthy one provided in § 961.571(1)(a). The definition refers to “primarily intended for use.” Subsec. 961.571(2) defines “primarily” as meaning “chiefly or mainly.”

Subsection 961.571(1)(b) provides that “drug paraphernalia” excludes:

1. Hypodermic syringes, needles and other objects used or intended for use in parenterally injecting substances into the human body.
2. Any items, including pipes, papers and accessories, that are designed for use or primarily intended for use with tobacco products.

[Note: “Parenteral” means “taken into the body or administered in a manner other than through the digestive tract, as by intravenous or intramuscular injection.” American Heritage Dictionary of the English Language, 3rd Edition.]

Section 961.572 sets forth a list of twelve factors that “a court or other authority shall consider in addition to all other legally relevant factors” in determining whether an object is drug paraphernalia. It may be helpful to the jury to add something like the following to the instruction:

In determining whether an object is drug paraphernalia, you may consider any of the following:

[list the factors in § 961.572(1) (a) through (L) that apply].

6. Whether a substance is a “controlled substance” is a legal conclusion which the court may pass along to the jury.

It is helpful to instruct the jury that any statutorily listed controlled substance is a “controlled substance,” as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the paraphernalia was used in connection with cocaine, the jury should be instructed: “Cocaine is a controlled substance.”

In contrast, if the evidence shows that the paraphernalia was used in connection with “5F-AMQRZ,” a non-statutorily listed synthetic cannabinoid, the jury should be instructed: “A synthetic cannabinoid is a controlled substance,” not that “5F-AMQRZ” is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

Whether the item of alleged paraphernalia was used in connection with a controlled substance is the factual issue that the jury must determine.

Note that offenses involving methamphetamine are separately defined in sub. (3) of § 961.573 and carry a higher penalty. See Comment preceding note 1, supra.

7. This mental element is specifically required by § 961.573.

The United States Supreme Court reviewed the mental element required by a federal statute relating to drug paraphernalia in Posters 'N' Things v. United States, 114 S.Ct. 1747 (May 23, 1994). The court focused on the definition of “drug paraphernalia” found in 21 U.S.C. § 857, which, like § 961.571(1)(a), refers to material “primarily intended” for use in ingesting, etc., drugs. The court held that the reference to “primarily intended” in the definition did not serve as the basis for a subjective mental requirement that would apply to the offense of selling drug paraphernalia. Rather, the Court held that all that is required for violations of § 857 is that the defendant “knew that the items at issue are likely to be used with illegal drugs.”

The decision in Posters 'N' Things is not directly applicable to interpreting the Wisconsin statute addressed by this instruction. Here, the subjective mental element is stated in § 961.573, which defines the crime as possession of drug paraphernalia **with the primary intent** to ingest, etc., a controlled substance. This specifically requires a subjective mental element; one need not rely on the argument made by the Posters defendant that the reference to “primarily intended” in the definition of drug paraphernalia was the source of such an element.